IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.847 OF 2002

IN

SESSIONS CASE 113 OF 2000

Maheboob Ali @ Fullan Lal
Mohd.Fakir .. Appellant

Vs.

The State of Maharashtra Respondent

Ms.Alpa T.Javeri for the appellant

Mr.K.V.Saste, A.P.P. for the respondent state

CORAM : J.N.PATEL &
A.A.SAYED, JJ.

DATED : 26TH APRIL, 2007

ORAL JUDGMENT (PER J.N.PATEL, J):

1. The appellant accused came to be convicted and sentenced by the Additional Sessions Judge, Thane by judgment and order dt.07.02.2002 for having committed an offence punishable under section 302 of the Indian Penal Code and thereby to suffer R.I. for life and to pay fine of Rs.1000/- in default to suffer rigorous imprisonment for one

year. The learned Additional Sessions Judge also granted him set off for the period during which he was in custody during trial which is the subject matter of challenge in this appeal.

2. Briefly stated the prosecution case is that the appellant accused Mehboob Ali alias Fullan Lal Mohd.Fakir and the deceased Mohammed Alim Ahmed Khan have migrated from U.P. and were working at the powerloom of Ambu Shet which was run under the supervision of P.W.No.1, Rais Ahmed Abdul Jamil Ansari. They were working in the said factory since 7-8 months and were residing in the factory itself as they were not having any residential accommodation at Bhiwandi and since the salaries of workers in the said factory were not paid in time, they stopped functioning during the night shift since 4 months.

3. On the fateful night i.e. on 28.10.99 both the accused and deceased Mohammed Alim went to sleep in the factory shed. On the next day in the morning i.e. on 29.10.99 at about 8.30 a.m. when P.W.No.1 was going towards the factory he saw the

appellant accused coming from the factory with his air bag. Rais Ahmed P.W.No.1 being the Supervisor stopped him and asked him as to where he was going to which he replied that the said factory was not working properly and salary was also not being paid to the workers in time and therefore, he was going to Mumbai in search of the job. Rais Ahmed, P.W.No.1 asked the accused for the keys of the said factory. He told him that it was with the victim and went away. When Rais Ahmed P.W.No.1 went to the factory he found that the door of it was locked so he returned thinking that the victim might have gone somewhere. When Rais Ahmed P.W.No.1 found that the victim was not available for the whole day, he made enquiries from his relatives at Mumbai and found that he has not been to his relatives and as he did not return till the next morning i.e. 30.10.99 till 7.30 a.m., P.W.No.1 alongwith the workers opened the said factory door by using a duplicate key which he got prepared. When P.W.No.1 Rais Ahmed alongwith the workers entered the factory, he saw the dead body of the deceased Mohammed Alim was lying in a pool of blood. On this, P.W.No.1, Rais Ahmed came out of the factory

and informed the said fact to Istiak Jamilludin P.W.No.2 i.e. his nephew and both of them came to the spot and thereafter went to the police station and reported the incident. On the complaint of P.W.No.1, Rais Ahmed, Bhiwandi Town Police Station registered the crime no.I 168/99 under Section 302 of the I.P.C. and the matter was taken up for investigation. The Police prepared inquest panchnama of the dead body which was sent for post mortem examination. He also prepared spot panchnama and recorded statement of witnesses conversant with the facts of the case.

4. In the course of investigation, it revealed that the appellant accused is the suspect and therefore he was arrested from his native place at village Takiya Tal.Lalganja, Dist. Pratapgadh, U.P. Articles seized during the course of investigation and recovered at the instance of the accused from the room of his elder brother at Shanti Nagar, Bhiwandi were sent to the C.A.'s office. The police were also able to recover the keys at the instance of the accused concealed on the tin shed of the factory. After the completion

of the investigation, charge sheet came to be filed in the court of J.M.F.C. who committed the same to the Sessions Court for trial.

5. The appellant accused was charged for having committed murder. The appellant accused pleaded not guilty and claimed to be tried. He took a plea that at the relevant time he was at his native place and therefore he is ignorant about the incident and made a specific statement u.s.313 of the Cr.P.C. that the deceased Mohammed Alim used to tease Rais Ahmed P.W.No.1 about his wife and due to that there used to be quarrel amongst them and it is Rais Ahmed P.W.No.1 who has murdered Mohammed Alim because there used to be quarrel amongst them.

6. The prosecution case is based on circumstantial evidence i.e. the appellant accused and the victim being last seen together, the appellant accused had an opportunity to commit the offence and the appellant accused had motive to kill the deceased. P.W.No.1 Rais Ahmed saw the appellant leaving the place on 29.10.99 and it is only on 30.10.99 when the factory was opened that

the dead body was discovered and further, the keys of the factory and the clothes were discovered at the instance of the appellant accused.

7. In support of the prosecution case, the prosecution examined in all 7 witnesses. The learned counsel for the appellant accused submitted that the prosecution has failed to prove the guilt of the appellant accused on the basis of circumstantial evidence laid by them. It is submitted that admittedly the appellant accused had left Bhiwandi atleast 48 hours before the body of the Mohammed Alim was found in the factory and therefore, the possibility of any other person having committed the murder cannot be ruled out. It is submitted that the conduct of the appellant accused also goes to show that as he was not getting wages in time and there was no regular work in the factory, he had gone to his native place. It is further submitted that as the prosecution has failed to prove the case against the appellant accused, he deserves to be given benefit of doubt.

8. On the otherhand, the learned A.P.P.

submitted that the trial court has examined the evidence on record and has arrived at a conclusion that the prosecution has proved that the circumstances brought on record clearly goes to indicate that it is the appellant accused who has committed murder. It is further submitted that the appellant accused has taken a plea of allibi in his defence that he has gone to his father in laws place but there is no evidence led by way of appellant accused nor anything has been brought on record to show that the appellant accused was not present in close proximity of time at the scene of occurrence. and therefore, the appeal deserves to be dismissed.

9. The key issue in the matter which requires consideration is whether the prosecution has been able to establish that it is the appellant accused who in all probability has committed the murder of Mohammed Alim in the factory shed of the powerloom owned by Ambu Seth on the night of 28.10.99. No doubt, the prosecution case rest on circumstantial evidence, as during investigation no direct evidence in the case has been collected. The trial

court while arriving at a conclusion that the appellant accused is guilty of having committed murder of Mohammed Alim has arrived at a finding that the prosecution has been able to establish the case based on the following facts which are brought on record by tendering circumstantial evidence:

1. Deceased Mohammed Alim and the accused Mehboob Ali used to work in the same powerloom factory of Ambu Seth during the period of this incident.

2. They were not having any place of the residence at Bhiwandi, and, therefore, they used to sleep in the factory and used to take meals in the mess.

3. There was a quarrel in between deceased Mohammed Alim and accused Mehboob Ali prior to this incident over the fact of deceased Mohammed Alim saying that the complainant Rais Ahmed P.W.No.1 was having illicit relations with the wife of the accused Mehboob Ali and threatened to kill the deceased Mohammed Alim.

4. During the night in between 28th and 29th at about 12 mid night, complainant Rais Ahmed P.W.No.1 saw both of them going to the factory for sleeping.

5. On 29th October, 1999, at about 8.30 a.m. Complainant Rais Ahmed P.W.No.1 saw the accused Mehboob Ali going away from the factory of Ambu Seth and on enquiry, he told the complainant Rais Ahmed that he was going to Mumbai, since the factory was not working properly, and that key of the lock

of the factory was with deceased Mohammed Alim.

6. The door of the concerned powerloom factory was found locked from the above referred time till it was opened by complainant Rais Ahmed with the help of the duplicate key on 30.10.99 at about 8 to 8.30 a.m., at which time the dead body of deceased Mohammed Alim was lying in the said factory.

7. The accused Mehboob Alim was subsequently found to have gone to the village of his father in law in U.P. and he was apprehended there.

8. Discovery of clothes accused Mehboob Alim as per the memorandum statement of and at the instance of accused Mehboob Alim.

9. Discovery of key of the lock of the door of the factory from about the said factory as per memorandum statement of and at the instance of accused Mehboob Alim.

10. The fact that the death of Mohammed Alim was homicidal is not much disputed. Inspite of this fact being not disputed, medical evidence requires consideration for the purpose of appreciating the nature of injuries so as to correlate the weapon of assault and also the possible time of death in the context of theory of last seen together.

11. P.W.No.6, Dr.Gazanfarali Khan conducted

autopsy on the dead body of Mohammed Alim Shahid Ahmed Khan and observed that there were in all five contused lacerated wounds on different parts of the body particularly on head and there was a depressed fracture present over left parietal bone and that the injuries were ante mortem. On internal examination he found the following :

> 1. Scalp - Contusion present under the scalp corresponding to external injuries nos.1, 2, 3 and 4.
>
> 2. Skull - Depressed fracture 5 x 5 cms preent over the left parietal bone. Corresponding to external injury no.3 in Col.No.17.
>
> 3. Brain - Extra dural haemotoma, 10 x 10 cm present in left parietal region. 100ml of blood present. Contusion 7 x 2 cms. present over the left parietallobe of brain corresponding to external injury no.2 of Col. No.17 of post mortem report ex.22.

12. In the opinion of Dr.Khan P.W.No.6 the cause of death was due to Cardio Respiratory Failure due to injury to brain due to fracture of skull bone due to hard and blunt object. Besides, the abovereferred injuries found on the dead body of Mohd.Alim were sufficient to cause death in the ordinary course of nature and therefore, the case

of the prosecution that the deceased was assaulted by wooden mar danda (Article 4) before the court can be accepted, as even according to Dr.Khan, P.W.No.6, such injuries found on the body of said Mohd.Alim could have been caused with wooden mar danda (Article 4).

13. In the cross examination of Dr.Khan P.W.No.6 it has been stated that when the body was received by him for conducting post mortem examination, it was slightly decomposed and that in the post mortem examination report in the column - Additional remarks with where possible, medical officer's deduction from the state of the contents of the stomach as to time of death and last meal, it was noted 'died within 4 to 6 hours of taking last food intake' and as the body was detected on 30.10.99 and was immediately sent for post mortem examination on the very day at 4.30 p.m. to Indira Gandhi Memorial Hospital, Bhiwandi and the doctor finding the body slightly decomposed, is indicative of the fact that the victim died atleast a day before the body was brought for post mortem report. Dr.Khan has specifically denied the suggestion that

Mohd.Alim must have died before 4/5 days and such a suggestion was rightly denied by the Medical Officer taking into consideration the condition of the body and even there is no other evidence on record to show that the dead body was lying in the factory for last 4/5 days before it was detected by P.W.No.1, Rais Ahmed.

14. Now the fact that the victim in all probability died in the night on 28.10.99 gets established by the evidence of P.W.No.1, Rais Ahmed. Rais Ahmed has deposed in his evidence before the court that he used to work in the said factory in the capacity of Supervisor and the same was owned by Ambu Seth and was taken on contract by his nephew Istiak Ahmed who is also examined as a witness. He knows both the appellant accused and the victim as they belong to the same village. He has also deposed to the effect that the deceased Mohammed Alim and the appellant accused who were working in the powerloom prior to the incident were residing in the factory shed itself as the work in the night shift was discontinued. Rais Ahmed, P.W.No.1 has further deposed to the effect that on

28.10.99 he went to supervise the other factory whereas deceased Mohammed Alim and accused went to sleep in the said powerloom factory. This fact deposed by Rais Ahmed P.W.No.1 clearly goes to show that on the fateful night, the deceased Mohammed Alim and accused Mehboob Ali were two persons who went to sleep in the said powerloom factory which was at the relevant time operated by Istiak Ahmed, P.W.No.2. It is on the next day i.e. on 29.10.99 at about 8 to 8.30 a.m. Rais Ahmed was going towards the factory of Ambu Seth from the factory of Saroj Rubiya Sheth, he saw the accused going by the road in front of New Liberty Hotel with one air bag and he asked him as to where he was going on that he said that the factory was not working properly and therefore, he was going to Mumbai. Rais Ahmed asked him about the keys to which he specifically stated that it was with Mohammed Alim the deceased. Rais Ahmed then went to the factory and found that it was locked from outside and therefore, he thought that Mohammed Alim must have gone somewhere after locking the door from outside. While he was returning, he also met the coolies who had come to take out the cloth from the factory of

Ambu Seth and as the door of the factory was found locked, the coolies went away. Rais Ahmed on the very day had visited the factory on more than one occasion but everytime the door of the factory was found locked and therefore, he thought that Mohammed Alim must have gone somewhere. But on the next day i.e. on 30.10.99 at about 7.30 a.m. to 8 a.m. he was required to open the lock of the factory by getting the duplicate keys prepared, as he could not find Mohammed Alim and when he opened the door of the factory he found Mohammed Alim was found lying dead having head injuries and it was bleeding. He noticed the cloth lying by the side was also stained with blood. He got frightened and he immediately went to Istiak Sheth and informed the above fact to him. This evidence of Rais Ahmed stands corroborated by P.W.No.2, Istiak Ahmed who were at the relevant time operating the powerloom of Ambu Seth. Istiak Ahmed, P.W.No.2 also in his evidence confirmed that on 30.10.99 the complainant, Rais Ahmed, P.W.No.1 came to him at about 10.30 to 11 a.m. and told him that when he opened the concerned powerloom, he found Mohammed Alim lying in a dead condition and blood was found

lying on the cloth kept nearby the said body. So he closed and locked the door of the powerloom immediately. Thereafter he accompanied Rais Ahmed to the Police Station and there Rais Ahmed lodged a complaint and thereafter, police accompanied him and Rais Ahmed to the said powerloom of Ambu Seth and after opening the same with the duplicate key further steps were taken by the police.

15. The evidence of these two witnesses clearly establishes that the appellant accused and the victim Mohammed Alim used to sleep in the factory shed and on the fateful night, they both went to sleep in the factory shed and on the very next day in the morning Rais Ahmed saw the appellant accused leaving the place with an air bag and on questioning the accused as to where he was going, he stated that as there was no work he was going to his relatives in Mumbai and thereafter Rais Ahmed was required to wait there for the whole day for Mohammed Alim to return as the appellant accused informed him that the keys of the factory shed are with Mohammed Alim and it is only on the next day that Rais Ahmed was required to open the factory

shed with the duplicate key under the impression that Mohammed Alim is not available and there he found his dead body lying.

16. The principle of last seen together is that a person, who is last found in the company of another, if later found missing, the person with whom he was last found, has to explain the circumstances in which they parted company. This is a case where the appellant accused told Rais Ahmed on being questioned as to where he was going, to which he replied that he was going to his relatives in Mumbai. He also stated that the keys are with Mohammed Alim. This is the conduct of the accused while leaving the scene of occurrence in early morning of 29.10.99 and thereafter the victim being found dead in the said shed. Therefore, considering the close proximity of place and time between the event of the accused having been last seen with the deceased and the factum of death, a rational mind stands persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should hold the

accused responsible for death. Here is a case where the conduct of the accused in leaving the place at the first available opportunity support the prosecution case that the deceased was killed by the appellant, who left the dead body inside the factory shed which was then locked.

17. The learned counsel for the appellant accused did try to lay emphasis on the fact that the last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult to prove the theory in this case as there is a long gap between the deceased having last seen with the accused going to the factory shed for sleeping and the dead body of the victim was detected on 30.10.99 in the morning i.e. almost 24 hours after the appellant accused has left the place and hence, it would be hazardous to come to a conclusion that it is the appellant accused who has committed the offence.

18. It is only to rule out this possibility that we have referred to the medical evidence and we find that the evidence of Rais Ahmed, P.W.No.1 and Istiak Ahmed, P.W.No.2 leads to irresistible conclusion that the appellant accused who was with the victim has killed Mohammed Alim and left the place and the possibility of any person other than the appellant accused having committed the offence being the author of the crime stands ruled out. However, the conduct of the appellant accused in leaving the place and being traced out at his father in laws place in U.P. also is indicative of the fact of his complicity in the offence and further the appellant accused having taken a plea of allibi which is obviously a false plea can also be taken as a circumstance against the appellant accused in establishing the case.

19. We find that the trial court has taken a right approach in appreciating the evidence on record in so far as circumstance of last seen together is concerned, which in our view by itself is sufficient to hold the appellant accused guilty

for having committed murder of Mohammed Alim. It has come in the evidence of P.W.No.3 Mohammed Shafique Jamiruddin that the two persons namely the appellant accused and the deceased used to quarrel amongst themselves. About 12-13 days prior to the alleged incident on one day when he was in the powerloom, he saw that both of them were quarrelling and both of them were threatening each other of dire consequences.

20. The appellant accused has taken the defence that it is P.W.No.1 Rais Ahmed who has committed murder of Mohammed Alim for the reason that Mohammed Alim used to tease the appellant accused having relations with the wife of the P.W.No.1 and that there used to be quarrels amongst them and it was Rais Ahmed who has murdered Mohammed Alim. If this is considered to be a motive then one has to appreciate that there was no reason why Rais Ahmed would have committed murder of Mohammed Alim and spare the appellant accused. This rather indicates that the reason why quarrel between the appellant accused and the victim was that the victim used to tease the appellant accused of having relations

with wife of P.W.No.1 because of which they had quarrel. On the fateful night as they were both sleeping in the shed the appellant accused committed murder of Mohammed Alim as he had all the opportunity to commit the offence and then left the place abandoning wooden mar danda (Article 4) which was subsequently discovered at his instance. Therefore, if we take into consideration the totality of the evidence laid by the prosecution and the defence of allibi taken by the deceased, we have no hesitation that the prosecution has proved that it is the appellant accused who has committed murder of Mohammed Alim. We therefore, do not find any merits in the appeal and the same is dismissed.

(SHRI J.N. PATEL, J)

(SHRI A.A. SAYED, J)